BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GLORIA MABEY, Claimant, v. J.R. SIMPLOT COMPANY, Self-Insured, Employer, Defendant.	)	**IC 1999-015219** **IC 2000-029862** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed October 26, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Twin Falls on October 19, 2006. Claimant, Gloria Mabey, was present in person and represented by Dennis R. Petersen of Idaho Falls. Defendant Self-Insured Employer, J.R. Simplot Company (Simplot), was represented by Wesley L. Scrivner, of Boise. The parties presented oral and documentary evidence. This matter was then continued for the taking of post-hearing depositions, the submission of briefs, and subsequently came under advisement on June 6, 2007.

ISSUES

The issues to be resolved were narrowed at hearing and are:

1. Whether Claimant's complaint is barred by Idaho Code §§ 72-719 and/or 706(3),

2. Whether and to what extent Claimant is entitled to total temporary disability benefits,

and

3. Whether Claimant is entitled to a change of physician and additional medical care.

ARGUMENTS OF THE PARTIES

Claimant maintains that as a result of her upper right extremity condition she is entitled to have Dr. Coleman recognized as her treating physician and to medical benefits including surgery he performed in 2005. Claimant asserts entitlement to temporary disability benefits from December 12 through 20, 2005, during her recovery from the surgery.

Defendant asserts that Claimant's claim for medical benefits for treatment by Dr. Coleman is barred by the Commission's prior decision and that her claim for temporary total disability benefits is barred by Idaho Code §§ 72-719 and 72-706(3).

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Dan Stephens taken at hearing on October 19, 2006;
2. Claimant's Exhibits 24 through 35 admitted at hearing;
3. Defendant's Exhibits 1 through 2 admitted at hearing;
4. The deposition of Donald A. Coleman, M.D., taken by Claimant on November 30, 2006, and
5. All evidence considered in the Industrial Commission's July 19, 2002, Findings of Fact, Conclusions of Law and Order (2002 Order), in this case.

After having considered the above evidence, and the arguments of the parties, the Referee submits the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On February 9, 1999, Claimant suffered an industrial accident at Simplot when she

developed pain in her right arm while forcefully scrubbing and sweeping water from a work area with a squeegee. She later developed left upper extremity symptoms. Claimant was eventually diagnosed with right lateral epicondylitis and posterior interosseous nerve (PIN) compression. She was treated conservatively by Eugene Holm, M.D. Don Coleman, M.D., performed PIN decompression surgery on November 14, 2000. The surgery was only marginally beneficial and Claimant's right arm continued to be symptomatic.

2. The Commission's 2002 Order in this case is incorporated herein by this reference. It provided in part:

> 1. Claimant's ongoing right upper extremity complaints were caused by the February 1999 accident. Claimant's ongoing left upper extremity complaints were not caused by the February 1999 or September 2000 accident.
>
> 2. Claimant is not entitled to reimbursement for the cost of the care provided or recommended by Dr. Coleman. Claimant is not presently entitled to further surgery for her right upper extremity. Claimant is entitled to medical care for ongoing pain in her right arm.
>
> 3. Claimant is entitled to temporary total disability benefits from the date of surgery, November 14, 2000, through February 1, 2001.

3. The 2002 Order found 3% whole person impairment and 15% permanent disability in excess of impairment. The 2002 Order also found Claimant to be a credible witness but noted: "however her perception of her pain and disability was significantly disproportionate to the actual physical problems from which she suffers, as described in the medical records." 2002 Order , p. 11.

4. Dr. Coleman examined Claimant on January 15, 2003, for continuing right upper extremity complaints. He recommended EMG testing which failed to document PIN compression at that time.

5. On July 8, 2003, Simplot sent Claimant to David Lamey, M.D., who diagnosed ongoing right forearm pain of unclear etiology, and recommended stellate blocks. The blocks were marginally helpful. On November 4, 2003, Dr. Lamey diagnosed regional pain syndrome.

6. In early 2004, Claimant underwent cervical MRI and EMG studies which showed no right radial neuropathy. In March 2004, Nancy Greenwald, M.D., reviewed Claimant's cervical MRI and EMG studies and recommended a LifeFit program.

7. On May 4, 2004, Claimant entered the four week LifeFit program. Simplot paid Claimant temporary total disability benefits through May 31, 2004, as she participated in the program. A functional capacity evaluation conducted at the end of the program objectively demonstrated that Claimant's effort in the evaluation was invalid and "represent[ed] a manipulated effort." Defendant's Exhibit 1, p. 53. At the conclusion of the LifeFit program, Dr. Greenwald found Claimant medically stable and assessed a 1% permanent impairment of the whole person. Defendant paid this additional impairment. Dr. Greenwald prescribed a six month supply of pain medication which she considered adequate for Claimant's industrial condition. Thereafter, Claimant continued to have right arm pain but never returned to Dr. Greenwald.

8. On March 15, 2005, Dr. Coleman examined Claimant for right upper extremity complaints. EMG testing on March 24, 2005, confirmed PIN compression.

9. On April 29, 2005, Claimant filed her present Complaint asserting a change of condition and entitlement to additional permanent impairment and permanent disability benefits.

10. Approximately December 12, 2005, Dr. Coleman performed a second surgical PIN decompression. Regarding the rationale for the second PIN decompression surgery, Dr. Coleman testified that occasionally scar tissue forming after the first surgery shrinks as it matures and causes a

reoccurrence of PIN compression.

11. On April 24, 2006, Claimant filed her Response to Request for Calendaring which set forth as an issue for hearing a request for change of physician.

12. Claimant testified her right forearm pain improved after her second surgery and she ceased taking prescription pain medication in favor of over-the-counter pain medication. However, she testified that her right elbow pain remained unchanged and her right arm function did not measurably improve. She testified that she can hardly function with her right arm.

13. Having observed the Claimant at hearing and evaluated the evidence, the Referee specifically concurs in, and finds still accurate, the 2002 Order's conclusion that Claimant's perception of her pain is significantly disproportionate to her objectively verified physical problems.

DISCUSSION AND FURTHER FINDINGS

14. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

15. **Idaho Code §§ 72-719 and 706(3).** Defendant asserts Claimant's Complaint is barred by Idaho Code §§ 72-719 and 706(3). Idaho Code § 72-719 authorizes modification of an award under certain circumstances within five years of the date of the industrial accident. Claimant filed her present Complaint more than six years after her industrial accident; well beyond the reach of Idaho Code § 72-719.

16. Idaho Code § 72-706 generally provides a five-year window for Complaints to be filed. Claimant's industrial accident occurred on February 9, 1999. Defendant paid income benefits

on her claim, including temporary disability benefits in 2004 during her participation in the LifeFit program, thus rendering Idaho Code Section 72-706(3) potentially applicable. Idaho Code § 72-706(3) provides:

> When income benefits discontinued. If income benefits have been paid and discontinued more than four (4) years from the date of the accident causing the injury or the date of first manifestation of an occupational disease, the claimant shall have one (1) year from the date of the last payment of income benefits within which to make and file with the commission an application requesting a hearing for additional income benefits.

Thus where payments for income benefits have been made and discontinued more than four years from the date of the accident, a claimant has one year from the last payment to file a Complaint.

17. Claimant herein correctly notes that Defendant paid her temporary total disability benefits during May 2004—more than four years after her accident. However, the Idaho Supreme Court has held that income payments must begin before the fourth anniversary of the accident date and continue across it to invoke subsection three's extension to the five-year statute of limitations. Salas v. J. R. Simplot Co., 138 Idaho 212, 61 P.3d 569 (2002); see also Walters v. Blincoe's Magic Valley Packing Co., 117 Idaho 239, 787 P.2d 225 (1989).

18. In the present case, the fourth anniversary of Claimant's industrial accident was February 9, 2003. Defendant asserts, and Claimant does not dispute, that she was not then receiving income benefit payments which continued across the fourth anniversary of her accident. Her Complaint was filed April 29, 2005. To invoke Idaho Code § 72-706(3) to extend the time for filing her Complaint until April 29, 2005, the record herein would have to establish that Claimant continuously received income benefits from prior to February 9, 2003, until at least April 29, 2004. It does not.

19. Claimant's claim for additional income benefits—including temporary total disability

benefits—is untimely and is barred by Idaho Code §§ 72-706 and 719.

20. **Change of physician and additional medical care.** Claimant asserts she is entitled to a change of physician to Dr. Donald Coleman and to the additional medical care, including the 2005 surgery, which he provided. Defendant asserts that this request is barred by the 2002 Order, by Claimant's failure to request a change of physician, and because the treatment provided by Dr. Coleman was unreasonable in that it did not improve Claimant's condition.

21. The 2002 Order found that Claimant had reached maximum medical stability on February 1, 2001. It determined that Claimant was not entitled to reimbursement for treatment by Dr. Coleman because Defendant was then providing reasonable medical treatment with Dr. Holm. The 2002 Order acknowledged that some continued medical care would be required for her ongoing pain:

> Claimant is not entitled to reimbursement for the cost of the care provided or recommended by Dr. Coleman. Claimant is not presently entitled to further surgery for her right upper extremity. Claimant is entitled to medical care for ongoing pain in her right arm.

2002 Order, p. 1 (emphasis supplied). The Commission's analysis within the 2002 Order elaborated:

> The question arises as to whether Claimant is entitled to further medical benefits. The clear weight of the medical evidence, including the marginal result of her prior surgery, demonstrates that the prognosis for additional surgery is poor. Even Dr. Coleman indicated he would not recommend surgery without further evaluation. Currently, no physician is recommending surgery. Claimant is not presently entitled to further surgery for her right upper extremity.

2002 Order, p. 14 (emphasis supplied).

22. A fair reading of the Commission's prior Order confirms that it pertained to the medical benefits Claimant sought in 2001 and does not necessarily preclude Claimant's present

assertions. However, the Commission's 2002 Order found:

> [A]t the time Claimant sought treatment with Dr. Coleman, Defendant was providing reasonable medical care in accordance with Idaho Code Section 72-432. Several physicians had opined Claimant would best be treated without surgery, and that she was medically stable. Given her ongoing complaints, Defendant continued to provide treatment with Dr. Holm. Claimant's unilateral decision to seek treatment with Dr. Coleman cannot be justified under the Workers' Compensation Law. She did not seek a proper medical referral and she failed to follow Commission procedures for a change of physician. The Commission's Judicial Rules of Practice and Procedure provide claimants the opportunity to petition for an expedited change of physician or to request a hearing on an emergency basis. Idaho Code Section 72-432(5) indicates that an employee who seeks medical care in a manner not provided for in that section, or as ordered by the Industrial Commission pursuant to that section, shall not be entitled to reimbursement for the cost of such care. Claimant is not entitled to reimbursement for the cost of the care provided or recommended by Dr. Coleman.

2002 Order, pp. 13-14.

23. Thus, the 2002 Order denied Claimant a change of physician because Claimant did not follow the procedures provided by Commission rule, unilaterally sought other medical care when Defendant was already providing medical care, and because the results of the first surgery were marginal. The circumstances now presented are strikingly similar to those giving rise to the 2002 Order.

24. Claimant did not petition for a change of physician prior to obtaining treatment, including her second surgery, from Dr. Coleman in 2005. Claimant did not return to Dr. Greenwald when her right arm pain allegedly continued after the LifeFit program. Rather, Claimant testified that she went to Dr. Coleman for further treatment in 2005 while she was still under Dr. Greenwald's care. Other physicians, including Dr. Greenwald and Dr. Lamey did not recommend further surgery. The second PIN decompression surgery by Dr. Coleman provided only marginal improvement. Claimant subjectively reported her right forearm pain was improved by the second surgery, but also

asserted that there is no increase in her functionality or improvement in her elbow pain.

25. The only evidence that Claimant's condition has improved due to her second surgery is her own subjective perception that her right forearm pain improved. As previously noted, the 2002 Order found Claimant's "perception of her pain and disability was significantly disproportionate to the actual physical problems from which she suffers, as described in the medical records." 2002 Order , p. 11. Significantly, Claimant gave an invalid effort in the functional capacity evaluation performed at the conclusion of the LifeFit program in 2004. Dr. Coleman testified that he would have expected some functional improvement due to her second surgery. However, Claimant testified that her right elbow pain remains unchanged, that she still cannot work, and that as a result of the second surgery she can do only "a little bit" more than before. Transcript, p. 29, L. 8. She obtained essentially no functional improvement from the second surgery. Claimant asserts that ceasing use of prescription pain medication in favor of over-the-counter pain medication following the second surgery corroborates her perception of improvement. However, part of Dr. Greenwald's treatment was to help wean Claimant off of prescription pain medication even before the second surgery. There is no persuasive evidence of improvement. Given Claimant's unreliable perception of her pain, her testimony alone of her subjective symptoms is not sufficiently persuasive to establish improvement.

26. Claimant has not proven her entitlement to a change of physician or to additional medical benefits provided by Dr. Coleman.

CONCLUSIONS OF LAW

1. Claimant's claim for additional income benefits, including total temporary disability benefits, is barred by Idaho Code §§ 72-706(3) and 719.

2. Claimant has not proven her entitlement to a change of physician or to additional medical benefits as provided by Dr. Coleman.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own, and issue an appropriate final order.

DATED this _26th_day of September, 2007.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _26th___ day of _October_____, 2007, a true and correct copy of Findings of Fact, Conclusions of Law, and Recommendation was served by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GLORIA MABEY, Claimant, v. J.R. SIMPLOT COMPANY, Self-Insured, Employer, Defendant.	)	**IC 1999-015219** **IC 2000-029862** **ORDER AND** **DISSENTING OPINION** Filed October 26, 2007

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant's claim for additional income benefits, including total temporary disability benefits, is barred by Idaho Code §§ 72-706(3) and 719.

2. Claimant has not proven her entitlement to a change of physician or to additional medical benefits as provided by Dr. Coleman.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this _26th day of _October_____, 2007.

INDUSTRIAL COMMISSION

_/s/_____
James F. Kile, Chairman

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

Commissioner R.D. Maynard dissenting:

After reviewing the record and progression of case law in this matter, I respectfully dissent from the conclusions of the majority.

In the present case, Claimant was injured on February 9, 1999. As stated by the majority, Claimant's November 2000 surgery was only marginally beneficial and Claimant's right arm continued to be symptomatic. Claimant continued to obtain treatment and undergo diagnostic testing – all of which was paid for by Defendants. Cervical MRI and EMG studies completed in early 2004 revealed no right radial neuropathy. After reviewing the test results, Dr. Greenwald recommended the LifeFit program which Claimant entered on May 4, 2004. Defendants paid temporary total disability benefits through May 31, 2004, while Claimant participated in the program.

The statute at issue reads as follows:

> When income benefits discontinued. If income benefits have been paid and discontinued more than four (4) years from the date of the accident causing the injury or the date of first manifestation of an occupational disease, the claimant shall have one (1) year from the date of the last payment of income benefits within which to make and file with the commission an application requesting a hearing for additional income benefits.

Idaho Code § 72-706(3). A plain reading of the statute (and recited by the majority herein) would be that when payments for income benefits have been made and discontinued more than four years from the date of the accident, a claimant has one year from the last payment to file a Complaint. However, the Idaho Supreme Court interpreted the language of the statute to allow for additional benefits if, and only if, disability payments were made across the date of the "fourth anniversary" of the accident – in this case, February 9, 2003.

It was a divided Court in 1989 that created what began as the "fifth anniversary" rule.[1] *Walters v. Blincoe's Magic Valley Packing Co.*, 117 Idaho 239, 787 P.2d 225 (1989). Walters had been paid medical benefits more than five years from the date of his industrial accident. On that basis, he filed with the Industrial Commission an application for hearing (within one year of the payment of his medical expenses) to determine whether he was entitled to further impairment and/or disability benefits. After the Commission dismissed Walters' application for hearing, he appealed to the Idaho Supreme Court.

The applicable statute utilized by the Court read, in pertinent part:

[1] The legislature amended Idaho Code § 72-706(2) in March 1989 "to clarify the time within which an application for hearing may be filed in cases where compensation has been paid and thereafter discontinued." 1989 Idaho Session Laws, Chapter 244, § 1, p. 592. The new language allowed a claimant one year from the date of the last payment of compensation to file an application for hearing if compensation had been paid and discontinued more than four (4) years from the date of the accident causing the injury. Hence, the switch to a "fourth anniversary" rule.

> When *compensation* discontinued. When payments of compensation have been made and thereafter discontinued, the claimant shall have five (5) years from the date of the accident causing the injury. . . or, if compensation is discontinued *more than five (5) years* from the date of the accident causing the injury. . . within one (1) year from the date of the last payment of *compensation*, within which to make and file with the commission an application requesting a hearing for further compensation and award.

Idaho Code § 72-706(2)(1988), (emphases added). The Court reasoned that the "latter portion of the statute referring to the discontinuance of compensation necessarily implies that the compensation was being paid on the fifth anniversary of the accident and was thereafter discontinued." *Walters*, 117 Idaho at 242, 787 P.2d at 228. Because no compensation was being paid to Walters on July 23, 1984 – the fifth anniversary of the accident – then no compensation was discontinued more than five years from the date of the accident.

Justice Bistline dissented from the majority's "narrow, hyper-technical construction of I.C. § 72-706(2)." *Id.* at 243, 229. He questioned the majority's rationale for making the date of the "fifth anniversary" something "magic" that provided an opportunity for more compensation benefits. Justice Bistline accused the majority of violating a cardinal principal of workers' compensation law – to construe the law liberally in favor of the claimant "since the humane purposes which it seeks to serve leave no room for narrow, technical construction." *Id.*

In *Ryen v. City of Coeur d'Alene*, 115 Idaho 791, 770 P.2d 800 (1989), Justice Huntley filed a specially concurring opinion wherein he lamented the outcome of the *Walters* decision. He argued "[n]othing in our workers' compensation statutes say anything about the 'fifth year anniversary' of an accident. This language, thus far, is wholly a judicial product, and as I hope to now explain, an unfortunate jurisprudential journey into the legislative domain which

undermines the rights of working people."[2] *Ryen*, 115 Idaho at 794, 770 P.2d at 803. Justice Huntley also pointed out that a plain reading of the statute would not be a guarantee of additional benefits – only a right to a hearing on the merits.

The inequity of the *Walters* decision is evident in *Figueroa v. Asarco, Inc.*, 126 Idaho 602, 888 P.2d 381 (1995). Figueroa suffered a compensable work injury in January of 1986. Medical treatment and time loss benefits were paid until he returned to work in July 1986. On January 27, 1987, Asarco's office received a letter from Dr. Pike regarding Figueroa's impairment rating. When Figueroa terminated his employment with Asarco in January 1988 his PPI remained unpaid.

Although Figueroa provided Asarco with his family's permanent address, the company failed to send a check for the outstanding PPI benefits. Instead, Asarco placed the money due and owing to Figueroa in a pool with money for other pending workers' compensation awards. Six and a half years after Figueroa's injury, four years after terminating employment with Asarco, Figueroa had occasion to contact the company. Thereafter, Asarco remitted a check for Figueroa's PPI benefits – without interest. Within two months of receiving his PPI monies, Figueroa filed an application for hearing with the Industrial Commission alleging he was entitled to additional benefits for his work injury. The Commission denied his request because, pursuant to *Walters*, his application for hearing was time-barred.

[2] In what could be perceived as the legislature's reaction to the *Walters* decision, Idaho Code § 72-706 was amended in 1991 "to provide that payment of *medical* benefits beyond five years shall not extend the time for filing a claim or application for hearing for additional income benefits." Idaho Session Laws, Chapter 206, § 1, p. 487 (emphasis added). As a result, only *income* benefits "paid and discontinued more than four (4) years from the date of the accident causing the injury" extended the claimant's right to file an application for hearing by one year from the date of the last payment.

Essentially, the *Walters* decision permits dilatory conduct by the employer/surety. If an employer/surety pays benefits on a claim before and after the fourth anniversary, but drags its heels – delaying payment – *across* the magic "fourth anniversary" date, the claimant loses his right to litigate any issue of income benefits. Such was the predicament encountered by Figueroa. Asarco admitted that Figueroa's impairment rating got "lost in the shuffle" and remained unpaid until more than six years after his accident and injury. Once paid, Asarco remained immune from any dispute as to the impairment rating or any additional benefits simply because payments were not being made "continuous and congruent across the 'fourth anniversary' threshold." *Salas v. J.R. Simplot Co.*, 138 Idaho 212, 213, 61 P.3d 569, 570 (2002).

The nature of payment of workers' compensation benefits is not fluid. Benefits ebb and flow as the claimant's condition either stabilizes or deteriorates. If a claimant has not been deemed stable, but is attempting to return to some modified form of work and that work attempt spans the magical "fourth anniversary" date of the accident, payment of subsequent benefits will not (according to the current interpretation of the statute) extend the claimant's time to file an application for hearing. The claimant loses any opportunity to argue for further income benefits. In the present case, Claimant was *still in a period of recovery*. Adherence to the *Walters* interpretation of Idaho Code § 72-706 works a hardship on claimants who would otherwise have an entitlement to benefits and thwarts the humane purposes for which the workers' compensation law was promulgated.

In sum, "[t]he provisions of the Worker's [sic] Compensation Law are to be liberally construed *in favor* of the employee." *Sprague v. Caldwell Transp. Inc.*, 116 Idaho 720, 721, 779 P.2d 395, 396 (1989). If a claimant is paid income benefits after the fourth year from the date of

the industrial accident he/she should be entitled to file an application for a hearing on the merits within a year of the last payment of income benefits. This interpretation of Idaho Code § 72-706(3) is consistent with the principle that, "[w]hen choosing between alternative constructions of a statute, [the Court] presumes that the statute was not enacted to work a hardship or to effect an oppressive result." *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000). "The whole idea is to get away from cumbersome procedures and technicalities of pleadings so that, to the greatest extent possible, claims for compensation can be decided *on their merits*." *Walters*, 117 Idaho at 345, 787 P.2d at 231 (Justice Bistline, dissenting - emphasis in original) (*citing Hattenburg v. Blanks*, 98 Idaho 485, 567 P.2d 829 (1977)).

For these reasons, I must respectfully dissent.

Dated this _26th day of October, 2007.

INDUSTRIAL COMMISSION

_/s/_____
R.D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _26th day of _October____, 2007, a true and correct copy of the foregoing **Order and Dissenting Opinion** was served by regular United States Mail upon each of the following persons:

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